SUPREME COURT NO. 85789-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE NUNEZ,

Petitioner.

STATE OF WASHINGTON,

Petitioner,

v.

GEORGE RYAN,

Respondent.

STATE'S POST-ARGUMENT SUPPLEMENTAL BRIEF

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A. INTRODUCTION

During oral argument, several justices questioned the attorneys about the double jeopardy implications of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and Justice González invited the attorneys to submit additional briefing on this issue. In accordance with that request, the State provides this brief to assist the Court in its consideration of the issues presented.

As an initial matter, the State observes that double jeopardy principles are not central to either party's position in this appeal, and such principles should not control whether this Court overrules Bashaw. Still, as reflected in the questions posed at oral argument, the application of the Bashaw rule in a given case may have double jeopardy implications. When a Bashaw-compliant jury instruction is used and the jury answers "no" to the special verdict, the parties and the trial court do not know whether the jury was deadlocked or was unanimous.[1] Under double jeopardy principles, this distinction

[1] The pattern instruction, revised after Bashaw, now provides: "In order to answer the special verdict form[s] 'yes,' you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer. If you unanimously agree that the answer to the question is 'no,' or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer 'no.'" Washington Pattern Jury Instructions: Criminal 160.00, available at http://government.westlaw.com/linkedslice/default.asp?SP=wcrji-1000.

would be significant because a unanimous acquittal on a crime bars any retrial, but a retrial is permitted when the jury is deadlocked. State v. Ervin, 158 Wn. 2d 746, 753, 147 P.3d 567 (2006); State v. Ahluwalia, 143 Wn.2d 527, 538, 22 P.3d 1254 (2001). However, to date, these double jeopardy principles have not been extended to sentencing enhancements or aggravating circumstances. This area of the law is evolving, but under existing caselaw, double jeopardy would not preclude a retrial on an enhancement or aggravating circumstance regardless of whether the jury was deadlocked or unanimously answered "no" on the special verdict.

B. ARGUMENT

1. THE RULE IN BASHAW IS NOT BASED UPON DOUBLE JEOPARDY PRINCIPLES.

The United States and Washington constitutions both provide that a defendant cannot be placed in jeopardy twice for the same offense. Ahluwalia, 143 Wn.2d at 535-36. The state and federal constitutions provide the same protections and are interpreted identically. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959). Double jeopardy protects the accused

against three possible events: 1) a second prosecution following an acquittal; 2) a second prosecution following a conviction; and 3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Constitutional double jeopardy provisions do not bar retrial following a mistrial granted after a deadlocked jury. Ahluwalia, 143 Wn.2d at 538.

In Bashaw, this Court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." 169 Wn.2d at 146. The Court concluded that the trial court erred by instructing the jury that it must be unanimous to answer "no" to a special verdict for a sentencing enhancement. Id. at 145-46. The Court stated that double jeopardy principles did not require this rule:

> This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, __ U.S. __, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg.

Id. at 146 n.7.

This is a correct statement of the law. Nunez and Ryan have not argued that Bashaw is supported by double jeopardy principles. Nor has the State argued that Bashaw is incorrect under double jeopardy caselaw. Instead, the State has argued that the Bashaw decision is incorrect because it is contrary to the requirement for jury unanimity set forth in Const. art. I, § § 21 and 22, and has no support in any constitutional provision, Washington statute, or caselaw.[2] See State's Consolidated Supplemental Brief at 3-19. It is for these reasons that the State requests that this Court overrule Bashaw and hold that a jury should be instructed that it must be unanimous when answering a special verdict, whether that answer is "yes" or "no."

[2] The State has further argued that the Bashaw decision is harmful because it may require resentencing and substantially reduced sentences in many of the most serious criminal cases, including aggravated first-degree murder, cases where the jury found exceptional sentence aggravating circumstances, and cases where the jury found sexual motivation, or a firearm or deadly weapon enhancement.

2. DOUBLE JEOPARDY PROTECTIONS ARE INAPPLICABLE TO AGGRAVATING CIRCUMSTANCES OR SENTENCE ENHANCEMENTS.

Historically, the United States Supreme Court has held that double jeopardy protections do not apply to sentencing enhancements. Monge v. California, 524 U.S. 721, 728, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998). The Court has recognized an exception for aggravating factors supporting the death penalty. Bullington v. Missouri, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981).

In Monge, the Court rejected an effort to extend double jeopardy protections to a sentence enhancement that, by statute, was required to be found by a jury beyond a reasonable doubt. Monge was charged with two sentence enhancements requiring proof relating to his prior conviction. He waived his right to a jury trial on the enhancement, and the trial court found the enhancement and imposed an enhanced sentence. Id. at 724. On appeal, the State conceded that the evidence was insufficient to support the enhancement, and the issue before the United States Supreme Court was whether double jeopardy prevented the State from reproving the enhancement.

The Court rejected the argument that double jeopardy principles should apply because the trial on the enhancement had "the hallmarks of a trial on guilt or innocence." Id. at 731. Instead, the Court held that "Bullington's rationale is confined to the unique circumstances of capital sentencing and that the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." Id. at 734.

Justice Scalia dissented. He questioned the distinction between elements of a crime and sentence enhancements and opined that Monge had been "functionally acquitted" of the enhancement because the evidence at trial was insufficient to sustain the trial court's "enhancement" findings. Id. at 737-41. He concluded that "[g]iving the State a second chance to prove [Monge] guilty of that same crime would violate the very core of the double jeopardy prohibition." Id. at 741.

The Court next confronted the issue in Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), a case involving the death penalty. At the first trial, the jury was deadlocked 9-to-3 for life imprisonment, and the court entered a life sentence. After Sattazahn's conviction was reversed, the jury convicted him again and imposed the death penalty. Sattazahn

then argued that double jeopardy should have prevented the submission of the aggravating circumstances at the second trial.

Justice Scalia, writing for the majority, rejected this claim and explained:

> Normally, "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." Richardson v. United States, 468 U.S. 317, 324, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). Petitioner contends, however, that given the unique treatment afforded capital-sentencing proceedings under Bullington, double-jeopardy protections were triggered when the jury deadlocked at his first sentencing proceeding and the court prescribed a sentence of life imprisonment pursuant to Pennsylvania law.
>
> We disagree. Under the Bullington line of cases just discussed, the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an "acquittal." Petitioner here cannot establish that the jury or the court "acquitted" him during his first capital-sentencing proceeding.

Id. at 109.

In a section of the opinion joined by only two other Justices, Justice Scalia, citing to his dissent in Monge, opined that other recent decisions, including Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), had "illuminated this part of our jurisprudence." 537 U.S. at 111. He added:

> We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial

> guarantee and what constitutes an "offence" for purposes of the Fifth Amendment's Double Jeopardy Clause. Cf. Monge v. California, 524 U.S. 721, 738, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (SCALIA, J., dissenting) ("The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence " not only "delimits the boundaries of ... important constitutional rights, like the Sixth Amendment right to trial by jury," but also "provides the foundation for our entire double jeopardy jurisprudence"). In the post-Ring world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)."

Id. at 111-12.

Since Sattazahn, the United States Supreme Court has not reconsidered the interplay of double jeopardy and sentence enhancements. However, in several recent decisions, this Court has addressed the issue and reaffirmed that double jeopardy principles do not extend to aggravating circumstances.

In State v. Benn, 161 Wn. 2d 256, 165 P.3d 1232 (2007), a jury convicted Benn of two counts of first degree murder and found the existence of one aggravating factor—that Benn murdered the two victims as "part of a common scheme or plan." The jury left the verdict form regarding the "single act" aggravating factor blank. Id.

at 260. After Benn's convictions were reversed, the State re-alleged that the murders were committed as a "single act," and the jury found this aggravating factor. Id.

The Court of Appeals held that the jury's silence regarding the "single act" aggravating factor constituted an implicit acquittal for purposes of double jeopardy and vacated the "single act" special verdict. Id. This Court reversed, holding that "[a] jury's failure to find the existence of an aggravating factor does not constitute an 'acquittal' of that factor for double jeopardy purposes." Id. at 264. The Court discussed Sattazahn and noted that, "Even under Justice Scalia's plurality, double jeopardy principles do not apply to individual aggravating factors. Courts interpreting the Sattazahn decision have rejected Benn's argument that a jury may 'acquit' a defendant of an individual aggravating factor." Id.

This Court again addressed a double jeopardy challenge to aggravating circumstances in State v. Eggleston, 164 Wn.2d 61, 187 P.3d 233 (2008). Eggleston was charged with aggravated murder in the first degree. With respect to the aggravating circumstance, the State alleged that Eggleston knew that the victim was a law enforcement officer. Id. at 67. Though the jury found him guilty only of second degree murder, they still answered the

special verdict for the aggravating circumstance "no." Id. The murder conviction was reversed, and at the next trial, the prosecutor argued that Eggleston knew that his victim was a police officer. Id. The trial court also imposed an exceptional sentence based upon the court's finding that Eggleston knew that the victim was a police officer. Id. at 69.

This Court rejected Eggleston's claim that the double jeopardy clause barred retrial on the aggravating factor that he knew the victim was a law enforcement officer. Id. at 70. The Court explained:

> The Supreme Court has held the double jeopardy clause prevents retrying a defendant on aggravating factors supporting the death penalty, when a previous jury had rejected the imposition of the death penalty. Bullington v. Missouri, 451 U.S. 430, 446, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). However, historically, double jeopardy protections are inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an "offense." Monge v. California, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). Thus, the Court has declined to extend this protection against retrial to noncapital sentencing aggravators, limiting the protection to death penalty determinations. Id. at 730, 118 S.Ct. 2246; see also North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (holding the double jeopardy clause does not bar the imposition of a longer sentence following retrial). The Court found the departure from the general rule in the death penalty context was appropriate based on the heightened protection

> afforded death penalty determinations. Monge, 524 U.S. at 734, 118 S.Ct. 2246; see also State v. Benn, 161 Wn.2d 256, 165 P.3d 1232 (2007) (jury's failure to find existence of an aggravating factor does not constitute an acquittal on that factor for purposes of double jeopardy), cert. denied, —— U.S. ——, 128 S.Ct. 2871, 171 L.Ed.2d 813 (2008).
>
> In this case, Eggleston was not facing a death sentence in his third trial. Accordingly, the double jeopardy clause did not prevent his retrial on the "law enforcement" aggravating factor.

Id. at 70-71.

Thus, Monge, Benn and Eggleston continue to recognize that double jeopardy protections are inapplicable to aggravating circumstances or sentence enhancements.[3] Though Justice Scalia has opined that these protections should extend to certain sentence enhancements, his views have not been joined by a majority of the United States Supreme Court. Most recently, the Court observed that the portion of Justice Scalia's opinion in Sattazahn advocating

[3] It may also be argued that the doctrine of collateral estoppel should prevent the State from retrying an aggravating circumstance or a sentence enhancement when the jury unanimously answered "no" to the special verdict. However, the United States Supreme Court and this Court have recognized that in a criminal case the doctrine of collateral estoppel is founded on the Fifth Amendment's guaranty against double jeopardy. Ashe v. Swenson, 397 U.S. 436, 442-43, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); State v. Vasquez, 148 Wn.2d 303, 307, 59 P.3d 648 (2002). If double jeopardy protections do not apply to sentence enhancements, logic would dictate that collateral estoppel also does not apply.

this position lacks any precedential value. State v. Kelley, 168 Wn.2d 72, 82, 226 P.3d 773 (2010).

Accordingly, under current law, double jeopardy principles should not bar a retrial on an aggravating circumstance or sentence enhancement even if the jury unanimously answered "no" to the special verdict. Therefore, when a Bashaw-compliant jury instruction is used and the jury answers "no," double jeopardy should not prohibit a second attempt to prove the enhancement.

This is an evolving area of the law. If the State's analysis is incorrect or double jeopardy caselaw develops in the direction of Justice Scalia's views, the application of Bashaw will impact the ability to accurately determine the double jeopardy consequences of a jury's "no" answer to a special verdict. When a Bashaw-compliant jury instruction is given and the jury answers "no," the parties and the trial court will not know whether the jury was deadlocked or was unanimous in answering "no." If double jeopardy principles apply, retrial on the enhancement should be allowed if the jury is deadlocked. Yet, if it is unknown whether the jury was deadlocked or unanimous, the implied acquittal doctrine may prevent the State from pursuing retrial. Ervin, 158 Wn.2d at 752-57. Even if the defendant successfully appeals his underlying

conviction and a new trial must be held, retrial on the enhancement could be barred even when the jury was deadlocked 11 to 1 in favor of finding the enhancement. The policy concerns discussed in Bashaw, such as judicial economy and finality, do not support such a result.

C. CONCLUSION

This supplemental brief is provided to assist the Court in consideration of the issues raised in the petition. For reasons set forth in previous briefing, the State respectfully requests that the Court reconsider its decision in Bashaw.

DATED this 3rd day of February, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to:

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containing a copy of the STATE'S POST-ARGUMENT SUPPLEMENTAL BRIEF, in STATE V. NUNEZ AND RYAN, Cause No. 85789-0, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name

2/3/12
Date

Done in Seattle, Washington